STATE OF MICHIGAN

IN THE SUPREME COURT

TOD MCLAIN, Personal Representative of the ESTATE OF TRACY MCLAIN,

Plaintiff-Appellant,

v

CITY OF LANSING FIRE DEPARTMENT, CITY OF LANSING, and JEFFREY WILLIAMS,

Defendants-Appellees

and

MICHAEL DEMPS,

Defendant.

_____/

Supreme Court No. 151421

Court of Appeals No. 318927

Ingham County Circuit Court
No. 11-000859-NH

Hon. James S. Jamo

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ESTATE OF TRACY MCLAIN'S REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Defendants candidly concede that the extension of this Court's holding in *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403; 716 NW2d 236 (2006), to EMSA defendants is "an issue of first impression" and of "jurisprudential significance." (Defs' Br in Opp 12, 2.) But Defendants insist there is no need for this Court's review because the Court of Appeals decided the issue "correctly." Defendants are wrong for two reasons.

First, the Court of Appeals' published opinion is the first decision in this State extending *Costa* beyond the context of the GTLA. And the opinion does so in clear contravention of MCL 600.2912e's directive that a medical-malpractice defendant "shall" file an affidavit of meritorious defense within 91 days. Regardless of correctness, this Court should engage in a merits review before allowing such a judicial abrogation of unambiguous statutory text.

Second, there are numerous reasons why *Costa* should not be judicially extended to EMSA defendants, including the fact that the EMSA extends to private actors and provides only qualified immunity, whereas the GTLA involves only public actors and provides absolute immunity. Indeed, despite the opportunity to clarify that the *Costa* rule applied to both GTLA and EMSA defendants, the Court applied the rule to the GTLA defendants alone in *Costa*.

Regarding the correct standard for resolving factual disputes in the context of a motion under MCR 2.116(C)(7), Defendants acknowledge that this Court is already weighing whether such disputes must be resolved by a trial court or a jury. (Defs' Br in Opp 13, citing *Yono v Dep't of Transp*, Docket No 150364.) And Defendants can only say that there are no material disputes by (1) claiming the inadmissibility of the hospital records—contrary to the Court of Appeals holding below, (2) ignoring that decedent McLain's vital signs rebounded immediately once the hospital re-intubated her, and (3) disregarding their own gross negligence in failing to check McLain's oxygen levels after intubation. Leave to appeal is warranted.

REPLY ARGUMENT

I. Leave is warranted to determine whether *Costa* should be judicially extended to abrogate the EMSA's plain language.

As noted above, Defendants concede the jurisprudential significance of the first question presented. Accordingly, Plaintiffs' reply-brief discussion of this issue will focus solely on the reasons why this Court should reverse the Court of Appeals and decline to extend *Costa*'s holding to judicially abrogate the EMSA's meritorious-affidavit requirement.

1. Governmental immunity is a characteristic of government. *Mack v City of Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002). But the EMSA applies to both governmental and non-governmental defendants. Accordingly, there is no logical basis to extend *Costa* to the EMSA. Doing so would actually afford private actors *more* protection than public actors under the GTLA, inasmuch as the Legislature amended the GTLA to remove its protections for tortious acts committed when providing medical care. See MCL 691.1407(4).

2. *Costa* itself implicitly rejected a result where private actors are treated equal to (or better than) public workers. The Court in *Costa* noted that governmental-immunity legislation "evidences a clear legislative judgment that public and private tortfeasors should be treated *differently*." *Costa*, 475 Mich at 409, citing *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000) (emphasis added).

3. Ignoring this fundamental difference between the GTLA and the EMSA, Defendants urge the Court to apply *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994), for the proposition that the GTLA and the EMSA "are to be read *in pari material*." (Defs' Br in Opp 19.) But *Jennings* only involved the meaning of the phrase "gross negligence" as used in both acts. It is a *non sequitur* to say that *Jennings* dictates *Costa*'s extension to the EMSA, and the Court need not overrule anything to reach the result McLain requests.

4. The GTLA and the EMSA are also very different statutory schemes in other respects. For example, the EMSA is an affirmative defense, whereas a plaintiff must specifically plead to avoid government immunity under the GTLA. *Mack*, 467 Mich at 201. Unlike the GTLA, the EMSA does not require that the defendants' actions be "the" one sole, proximate cause of the plaintiff's injuries. And whereas the GTLA grew out of a common-law immunity for public actors, the EMSA is entirely a legislative creation.

In sum, extending the *Costa* rule to the EMSA does violence to the EMSA's plain text and conflicts directly with the single-best indication of the Legislature's intent: its abrogation of GTLA immunity in the context of government officials providing medical care. If the Legislature desired that public actors providing medical care provide timely affidavits of meritorious defense in the context of the GTLA, it is difficult to imagine that the Legislature intended the exact opposite as applied to the EMSA.

II. Leave is also warranted to clarify how Michigan courts should resolve immunity claims under MCR 2.116(C)(7).

Defendants explain that this Court in *Yono* will soon be deciding the important issue of whether a court or a jury must decide disputed questions of material fact in the context of a motion under MCR 2.116(C)(7). (Defs' Br in Opp 13.) But Defendants inadequately discuss the import of the factual record in this case in several respects:

1. The opening sentence of Defendants' brief asserts that there was "a successful intubation." (Defs' Br in Opp 1.) But the best evidence of the breathing tube's location is the hospital records, and those records indicate that the breathing tube was in Mrs. McLain's esophagus. (App Ex G, History & Physical Report; Ex H, Post Patient Progress Notes; Ex I, Henney Patient Progress Notes.) Consistent with that diagnosis, as soon as the tube was removed and properly placed in Mrs. McLain's trachea, her vital signs quickly rebounded into the normal range (though too late to prevent brain damage and ultimately death.)

2. Defendants question the admissibility of the hospital records. (Defs' Br in Opp 32-36.) But the Court of Appeals resolved this issue against Defendants, noting that the records were admissible under MRE 803(6). (App Ex A, slip op 6 & n 8.) See also MRE 803(4); *Merrow v Bofferding*, 451 Mich 617; 581 NW2d 696 (1998). Defendants' cited case, *Green v Henry Ford Wyandotte Hosp*, 2014 WL 547610 (Mich Ct App, Feb 11, 2014), is unpublished and inapposite. Unlike the documents at issue here, the documents in *Green* "were not statements made for the purpose of medical treatment or diagnosis," and thus were not admissible under MRE 803(4). *Id.* at *5. Moreover, the plaintiff in *Green* failed to produce the testimony of the document custodian or similar qualified witness, "even after numerous admonitions and warnings from the trial court," rendering the documents ineligible for admission under MRE 803(6). *Id.* at *5-6.

3. Alternatively, Defendants rely on Defendant Williams' report, which suggests that the intubation was normal. But Williams wrote this report *after* the hospital had determined the tube was out of place, and *after* Mrs. McLain was known to be brain damaged due to a lack of oxygen. A reasonable jury could conclude that this was a self-serving report, written to cover up culpability for gross negligence, if it is even admissible at all. See MRE 803(6) (noting that such a business record is only admissible if prepared in "trustworth[y]" circumstances).

4. Alternatively, Defendants say that the evidence "at most" establishes "that the breathing tube was found in the decedent's esophagus upon her presentation to the hospital's emergency department." (Defs' Br in Opp 30.) In other words, the tube may have somehow relocated itself from the trachea to the esophagus so that Mrs. McLain could no longer breathe. This argument frames the most important point in the record debate: Mr. McLain contends that Defendants' gross negligence came in failing to monitor Mrs. McClain's oxygen levels *after* Defendant Williams placed the tube. It ultimately makes little difference whether the tube was

placed incorrectly or if it was in fact placed correctly but later dislodged. What matters is whether Defendants were appropriately monitoring. They were not. Defendant Williams testified that post-intubation, "you can use an O2 sensor [to] watch [the patient's] O2 level rise." (App Ex P, Williams Dep 44.) Yet no such O2 measurement was attempted in the field post-intubation—for nine critical minutes. Whether *this* failure constitutes gross negligence is a classic fact question that only a jury can resolve.

5. This material dispute of fact brings the analysis back to *Yono*, the case where this Court recently granted leave to decide "whether questions of fact on a motion for summary disposition involving governmental immunity under MCR 2.116(C)(7) must be resolved by the trial court at a hearing or submitted to a jury." *Yono v Dep't of Transp*, 864 NW2d 142 (2015). The instant matter implicates the same issue and adds an additional question: "Whether a trial court may weigh circumstantial evidence and resolve credibility determinations" in the context of deciding a motion under MCR 2.116(C)(7). It would be in the best interests of the lower courts and the bar to grant leave to appeal not only the question of whether *Costa*'s rule about affidavit of merit should be extended to the EMSA, but also the question of how a lower court decides disputed questions of fact under (C)(7). The latter question is particularly important here, as Defendant Williams' purported exculpatory evidence was created *by him*, thus making his credibility a central issue for a fact finder.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals erred in extending *Costa* to the context of an EMSA defense and allowing Defendants to get away with not having timely filed an affidavit of meritorious defense. Had the positions been reversed, and it had been the *plaintiff* who failed to timely file, there is no doubt that failure would have resulted in a dismissal. The reasons this Court advanced in *Costa* for judicially abrogating the statutory time for filing such an affidavit in the context of the GTLA

do not apply to the EMSA. Accordingly, the Court should grant leave, reverse the Court of Appeals, and enter a judgment of default in favor of Mr. McLain.

Alternatively, taking the facts in the light most favorable to Plaintiff, Defendants were grossly negligent in unsuccessfully intubating Tracy McLain and, most important, in failing to check her oxygen levels to ensure continued successful intubation. That failure resulted in irreparable brain damage to Mrs. McLain and her eventual death. The lower courts erred in resolving disputed fact issues simply because the context was a motion under MCR 2.116(C)(7) rather than under 2.116(C)(10). Leave should also be granted to clarify the standard for resolving a MCR 2.116(C)(7) motion, though the Court need only remand this case for trial in the event that a default judgment is not entered.

For these reasons, and those stated above and more fully in Plaintiff-Appellant's Application for Leave to Appeal, Plaintiff-Appellant respectfully requests that the Court grant leave to appeal. Alternatively, Mr. McLain asks that the Court reverse summarily and either direct entry of judgment in favor of Mr. McLain for Defendants' failure to submit an affidavit of meritorious defense, or direct that summary disposition be denied and a trial be held on the issue of Defendants' gross negligence.

Respectfully submitted,

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